

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL

74-1116

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MS

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES GIACALONE,

Appellant.

*On Appeal From The United States
District Court For The Eastern
District of New York*

APPELLANT'S APPENDIX

ALBERT E. SILBOWITZ
Attorney for Appellant
89-31 161st Street
Jamaica, N.Y. 11432
(212) 739-4720



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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA**

-v-

72-CR 79

JAMES GIACOLONE

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INDICTMENT

- - - - - X

SAME TITLE

- - - - - X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 8th day of October 1971, within the Eastern District of New York, the defendant JULIO VALE and the defendant JAMES GIACALONE, with intent to defraud, did keep in their possession and conceal approximately 3185 falsely made, forged and counterfeited Ten Dollar (\$10.00) United States Federal Reserve Notes bearing various serial numbers including but not limited to B77046242A and B62096377A, knowing the same to be falsely made, forged and counterfeited, (Title 18 United States Code, Section 472 and Section 2).

COUNT TWO

On or about the 8th day of October 1971, within the Eastern District of New York, the defendant JULIO VALE and the defendant JAMES GIACALONE, with intent to defraud, did pass, utter and publish approximately 3185 falsely made, forged and counterfeited Ten Dollar (\$10.00) United States Federal Reserve Notes bearing various serial numbers including but not limited to B77046242A and B62096377A, knowing the same to be falsely made, forged and counterfeited. (Title 18 United States Code, Section 472 and Section 2).

INDICTMENT

COUNT THREE

On or about the 8th day of October 1971, within the Eastern District of New York, the defendant JULIO VALE did, by using a dangerous and deadly weapon to wit: a loaded Beretta 32 Caliber automatic pistol forcibly and unlawfully assault, resist, oppose and intimidate agents of the United States Secret Service while said agents were engaged in the performance of their official duties. (Title 18, United States Code, Section 111).

COUNT FOUR

On or about the 18th day of October 1971, within the Eastern District of New York, the defendant JULIO VALE, with intent to defraud, did keep in his possession and conceal approximately 9244 falsely made, forged and counterfeited Ten Dollar (\$10.00) United States Federal Reserve Notes, in uncut sheet form, bearing various serial numbers, knowing the same to be falsely made, forged and counterfeited. (Title 18 United States Code, Section 472.)

COUNT FIVE

On or about the 1st day of January, 1972, within the Eastern District of New York, the defendant JAMES GIACALONE, with intent to defraud, did pass, utter and publish approximately 1000 falsely made, forged and counterfeited Ten Dollar (\$10.00) United States Federal Reserve Notes bearing various

INDICTMENT

serial numbers including, but not limited to B23694480B and B28469490B, knowing the same to be falsely made, forged and counterfeited. (Title 18, United States Code, Section 472).

COUNT SIX

On or about the 7th day of October 1971, within the Eastern District of New York, the defendant JOSE RAMON CRUZ and the defendant JOSE COLON, with intent to defraud, did keep in their possession and conceal approximately 40 falsely made, forged and counterfeited Ten Dollar (\$10.00) United States Federal Reserve Notes bearing various serial numbers, including but not limited to B62184782A, knowing the same to be falsely made, forged and counterfeited. (Title 18 United States Code, Section 472 and Section 2).

COUNT SEVEN

On or about the 8th day of December 1971, within the Eastern District of New York, the defendant JAMES PEREZ and the defendant SYLVIA VASQUEZ, with intent to defraud, did keep in their possession and conceal approximately 25 falsely made, forged and counterfeited Ten Dollar (\$10.00) United States Federal Reserve Notes bearing serial number B62096377A, knowing the same to be falsely made, forged and counterfeited. (Title 18 United States Code, Section 472 and Section 2).

COUNT EIGHT

On or about the 1st day of December 1971, within the

INDICTMENT

Eastern District of New York, the defendant ANNA DELIA ROJAS also known as Anna Rogers, with intent to defraud, did pass, utter and publish approximately 25 falsely made, forged and counterfeited Ten Dollar (\$10.00) United States Federal Reserve Notes bearing serial number B62096377A, knowing the same to be falsely made, forged and counterfeited.

(Title 18 United States Code, Section 472.)

COUNT NINE

On or about the 14th day of January 1972, within the Eastern District of New York, the defendant PHILIP STEIN, with intent to defraud, did pass, utter and publish approximately 400 falsely made, forged and counterfeited Ten Dollar (\$10.00) United States Federal Reserve Notes bearing serial numbers B23694480B and B284884490B, knowing the same to be falsely made, forged and counterfeited.

(Title 18, United States Code, Section 473.)

COUNT TEN

On or about and between the 1st day of September 1971 and the day of filing of this indictment, both dates being approximate and inclusive, within the Eastern District of New York, the defendant JULIO VALE, the defendant JAMES GIACALONE, the defendant JOSE RAMON CRUZ, the defendant JOSE COLON, the defendant JAMES PEREZ, the defendant ANNA DELIA ROJAS, also known as Anna Rogers, did knowingly and wilfully combine conspire and confederate with each

INDICTMENT

other and with various other people whose names are to the Grand Jury unknown, to commit an offense against the United States, in violation of Title 18 United States Code, Section 472, by conspiring with intent to defraud, to pass, utter, publish and keep in their possession and conceal, quantities of falsely made, forged and counterfeited United States Federal Reserve Notes. (Title 18 United States Code, Section 371).

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendants committed the following:

OVERT ACTS

1. The Grand Jury repeats and realleges all of the acts set forth in counts one through nine of this indictment as though more fully set forth as overt acts herein.

2. On or about October 7, 1971, at 1289 De Kalb Avenue, Brooklyn, New York, the defendant JULIO VALE transferred to the defendant JOSE COLON approximately 40 falsely made, forged and counterfeited Ten Dollar (\$10.00) United States Federal Reserve Notes.

3. On or about October 8, 1971 the defendant JAMES GIACALONE, in the vicinity of the intersection of DeKalb Avenue and Central Avenue in Brooklyn, New York, transferred to the defendant JULIO VALE a white shopping bag containing a quantity of falsely made, forged and counterfeited Ten

INDICTMENT

Dollar (\$10.00) United States Federal Reserve Notes.

A TRUE BILL

FOREMAN

United States Attorney

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

7

October 1971.

In both of these counts the defendant James Giacolone is charged directly with the offenses. He is also charged as an aider and abettor to Julio Vale.

Now, that's where the Title 18 Section 2 comes in. And aider and abettor is merely a person who participated in that offense, a criminal offense, and tries to make it succeed.

The third count of this indictment involving James Giacolone charges that on or about January 4th of 1972 the defendant James Giacolone passed, uttered and published approximately 1,000 forged, falsely made and counterfeit ten dollar bills. Again, uttering and publishing means sold or transferred to another person.

The final count concerning James Giacolone is a conspiracy count. It alleges that during the latter part of 1971 and well into -- ir into early 1972, James Giacolone conspired and combined with several other persons, including Julio Vale, including a man by the

2 name of Philip Stein, and other persons who
3 are not even named in this indictment, to
4 possess counterfeit money and to pass, utter,
5 publish and sell counterfeit money.
6

7 This conspiracy is alleged to be in
8 violation of Title 18 United States Code, Section
9 371. This count, this conspiracy count,
10 also alleges several over acts, one of which
11 is that on or about October 8th, 1971
12 that James Giacolone, this defendant, in the
13 vicinity of the intersection of the Dekalb
14 Avenue and Myrtle Avenue in Brooklyn, trans-
15 ferred to Julio Vale a white bag containing
16 a quantity of counterfeit ten dollar Federal
17 Reserve notes.

18 So that's the indictment. Those are
19 the charges. Now, what are we going to prove?
20 Translating that into plain language, plain
21 English language, what are we going to prove?

22 As to the first two counts, the Government
23 will prove to you that on October 8th, 1971
24 defendant James Giacolone negotiated with an
25 undercover agent of the United States Secret
Service for the sale of counterfeit ten dollar

2 bills. We'll further prove that on that same
3 night, the evening of October 8, 1971, that
4 James Giacolone delivered to an intermediary,
5 Julio Vale, a bag containing 3,185 counter-
6 feit Federal Reserve notes. And thereby we
7 shall -- will prove that Giacolone participated
8 in the possession and sale of counterfeit
9 ten dollar Federal Reserve notes.

10 As to the third count, the Government
11 will prove that on January 6th, and January 14th
12 of 1972, Philip Stein sold approximately \$5,000
13 in counterfeit ten dollar Federal Reserve notes.
14 We will establish that these notes were
15 from the same source as the notes transferred
16 on October 8th, that source being James
17 Giacolone and his associates in the counter-
18 feiting business.

19 Now, we come to the conspiracy count.
20 A conspiracy is nothing more than what essen-
21 tially is a partnership formed for the purpose
22 of committing an illegal act, a crime. The
23 partnership or agreement itself becomes a crime
24 when one or more of the persons who entered
25 into that agreement commits an overt act --

2 MR. LONSCHHEIN: Excuse me, your Honor.

3 I am going to object to the prosecutor's
4 definition of what a conspiracy is. I think
5 that the Court is better suited to charge
6 the jury with respect to that.

7 MR. CLAREY: Your Honor, my definitions
8 will not be at all extensive. I am not attempting
9 to substitute myself for the Court.

10 THE COURT: Well, we're going to sus-
11 tain the objection though, at this time.

12 MR. CLAREY: In this particular case
13 it will be shown that several acts were com-
14 mitted in furtherance of this conspiracy, and
15 that those acts were actually in effect criminal
16 acts.

17 Now, during the presentation of the
18 Government's case, you will hear testimony
19 concerning not only the defendant sitting
20 in this Courtroom, James Giacalone, but
21 you will hear testimony concerning various other
22 people. I have already mentioned two of them,
23 Julio Vale and Philip Stein. In this case this
24 case involves James Giacalone only. And you will
25 have to concern yourself with the guilt or innocence
only of James Giacalone. This is his separate trial.

Opening - Clarey

1 where the actual printing occurred. In this
2 particular case, and for the money involved
3 in this case before us, the printing occurred
4 in a sewing machine factory, which was at one
5 time operated by James Giacolone.
6

7 In this case we will also hear from
8 another person who participated in the Conspir-
9 acy. He doesn't know as much about the opera-
10 tion as Art Romell. He wasn't in it from the
11 very beginning. He could describe to us how
12 he acquired the \$5,000 which he sold in Janu-
13 ary to undercover Agents, from this defendant,
14 James Giacolone. He can describe to us various
15 other tasks he performed to further this crim-
16 inal Conspiracy.

17 Ladies and Gentlemen, at the conclusion
18 of the Government's case, I submit to you that
19 you will be convinced beyond a reasonable doubt
20 that this defendant, James Giacolone, not only
21 performed the substantive criminal offenses
22 alleged in the first three Counts of this Indict-
23 ment, but participated in a much wider, much
24 broader scheme than these three isolated in-
25 stances, that he is guilty of criminal Conspir-

2 that we gave to the note bearing those characteristics.

3 Q Agent Coppola, directing your attention to
4 the 14th of January, 1972. Did you have occasion to meet
5 one Philip Stein?

6 A Yes, I did.

7 Q Where did you meet him?

8 A I met Mr. Stein at 780 Saratoga Avenue in Brooklyn.

9 Q Was anyone with you when you met him?

10 A Yes, sir.

11 Q Was that a person you are not going to name
12 at the present time?

13 A I would name him.

14 Q Who was with you?

15 A Carl Barish.

16 Q How did you meet Mr. Stein?

17 A I was introduced to Mr. Stein on that date at 788
18 Saratoga Avenue as Joey.

19 Q What time of day were you introduced to Mr.
20 Stein?

21 A 6:15 in the morning.

22 Q Where was the introduction made?

23 A Excuse me?

24 I met him at approximately 7:00 o'clock A.M. I was
25 at that location at 6:15.

2 Q Where exactly was the introduction made?

3 A That address is a drycleaning store on the first
4 floor, where all the work is done, and upstairs is an office.
5 I met him in the office at that location.

6 Q Was there a conversation at that time?

7 A Yes, I was allegedly a person interested in purchas-
8 ing counterfeit currency from Mr. Stein.

9 Q What was said by whom at that time?

10 A Mr. Stein, after introduction, took out a Belair
11 Cigarette carton and from in the carton he took out \$10
12 counterfeit Federal Reserve notes, explained to me that
13 these notes were --

14 Q Could you say what he said?

15 A He said that these notes were of good quality, they
16 were real good. He could get me any amount I wanted. We
17 discussed price. He said that \$4,000 in counterfeit 10's
18 which he had -- probably referred to it as 10's, notes,
19 queer -- These are various terms used when discussing
20 counterfeit currency.

21 He said that the \$4,000 which he had would cost me
22 1000 in genuine currency, which is twenty-five points.

23 He said that he could make future deliveries to me,
24 and he could get me large quantities of these 10's. We had
25 a short discussion, where I argued with him about the high

2 price of the notes, and he refused to sell them to me for
3 any less, and stated that maybe future buys will come at
4 less points.

5 After this conversation, I gave a pre-arranged
6 signal to the Agents who were surveilling this meet to effect
7 the arrest, and Mr. Stein was arrested, and a simulated
8 arrest of myself took place.

9 MR. LONSCHHEIN: Your Honor, may we ap-
10 proach the side bar?

11 (The following transpired at the side
12 bar.)

13 MR. LONSCHHEIN: Your Honor, the United
14 States Attorney was kind enough to supply me
15 with 3500 Material concerning this transaction.
16 In reading over the 3500 Material, I see nothing
17 to indicate that the source of this money was
18 my client. It may well be that at a later
19 time counsel may show a connection between this
20 transaction. I submit, to do so at this time --
21 First of all, it is controversial.

22 Secondly, there is no evidence at all
23 to show any connection, and the showing of this
24 money, and the offering of it will be prejudicial
25 to my client.

Coppola - direct

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1
2 MR. CLAREY: I am only going to mark
3 this money at this time. I intend to call
4 Mr. Stein as a witness, but I thought I'd
5 save the time of calling Agent Coppola back
6 to the stand.

7 THE COURT: We are just going to mark
8 it for identification?

9 MR. CLAREY: That's correct.

10 MR. LONSCHHEIN: If counsel will give
11 me his assurance that Philip Stein will be a
12 witness for the Government and legally connect
13 that which is being adduced right now, I will
14 withdraw my objection.

15 MR. CLAREY: I won't even offer it
16 into evidence. I will have the Agent identify
17 it, to avoid the necessity of calling him back.

18 MR. LONSCHHEIN: Perhaps you misunderstood
19 me. It is not only the evidence that I object
20 to. I object to the testimony as well, you see.

21 MR. CLAREY: If you will note, there is
22 a Count as to transactions in January. It is
23 a substantive Count. I am going to call Stein,
24 and he will testify that he got the money from
25 Giacalone.

1
2 MR. LONSCHHEIN: Given that assurance,
3 your Honor, I, of course, will press my objec-
4 tion, and I hope that the Court will rule sub-
5 ject to my later objection, if, in the event
6 Stein does not connect this particular trans-
7 action to my client.

8 THE COURT: We will not admit it at this
9 time.

10 We will allow it to be marked for identi-
11 fication, and we will let you put it through
12 Stein.

13 MR. CLAREY: I have no intention of
14 showing it to the jury until Stein has testi-
15 fied.

16 THE COURT: If the Government fails to
17 do so, I am sure Mr. Lonschein will renew his
18 objection at that time.

19 MR. LONSCHHEIN: Yes. Thank you.

20 MR. CLAREY: Thank you.

21 (The following transpired in open court.)

22 MR. CLAREY: May I have these marked,
23 next in line? I think 3, 3-A and 3-B.

24 THE CLERK: The first batch, in order
25 not to deface the documents, I will put a piece

2 A Yes, 3 and 3-A are the counterfeit notes which I
3 purchased from Philip Stein on January 14, 1972.

4 3-B is the Belair carton which I referred to in
5 which the notes were contained that day.

6 MR. CLAREY: I have no further questions
7 of this witness at this time. I would like to
8 pass the Exhibits which are in evidence among
9 the jury at this time if it is permitted, or
10 at least a selected three packages of them.

11 MR. LONSCHHEIN: I would have no objection
12 to that procedure.

13 MR. CLAREY: Shall I give it to your
14 Clerk?

15 THE COURT: No, you may pass it around.

16 MR. LONSCHHEIN: May I respectfully ask
17 that after the jury examines the material
18 marked in evidence, that we recess for the day,
19 and I begin my cross-examination tomorrow?

20 THE COURT: Yes.

21 (continued on next page.)

FL file

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2 THE COURT: Have you all had an opportunity
3 to inspect one of the bundles?

4 Ladies and gentlemen, we didn't take an
5 afternoon recess, so we'll let you go now.

6 MR. CLAREY: Your Honor, excuse me, there
7 is one other question that I would like to ask
8 concerning --

9 THE COURT: We won't let you go now.

10 MR. CLAREY: I'm sorry. If I may?

11 THE COURT: Surely.

12 BY MR. CLAREY (Cont.):

13 Q Agent Coppola, concerning the notes in exhibit
14 3 and 3-A which you acquired from Philip Stein, is there any
15 connection between those notes and the others -- on the face
16 of it --

17 MR. LONSCHHEIN: Excuse me, your Honor.
18 As I understand it, the notes acquired from
19 Philip Stein were not received in evidence. Now
20 he's asking --

21 MR. CLAREY: Oh --

22 MR. LONSCHHEIN: He's asking the witness
23 something having to do with those notes, and I
24 object to it, your Honor.

25 MR. CLAREY: Well --

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2 A Mrs. Giacalone is sitting on the first bench on the
3 left.

4 Q On your left?

5 A Yes.

6 MR. CLAREY: I have no further questions.

7 MR. LONSCHHEIN: No questions.

8 MR. CLAREY: May I have a side bar?

9 THE COURT: Yes.

10 (The following occurred at the side bar.)

11 MR. CLAREY: Your Honor, I have pretty
12 well decided not to call Philip Stein as a wit-
13 ness and not to offer the notes which are 3
14 in evidence.

15 I will call a representative, however,
16 of the New York State Motor Vehicle Department.
17 He will not be here until tomorrow at 10 o'clock.
18 It is to establish the registration of the auto-
19 mobile.

20 MR. LONSCHHEIN: Give me one minute.
21 Maybe I could do it by stipulation and you could
22 call him and tell him not to come down.

23 MR. CLAREY: Fine.

24 MR. LONSCHHEIN: Let's go one step further.

25 You say you're not going to call Stein?

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MR. CLAREY: No.

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MR. LONSCHHEIN: Let me ask you this question and talking candidly with the Court:

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6

There is one count that charges my client --

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MR. CLAREY: I am prepared to move to dismiss it.

9

THE COURT: Which one is that?

10

11

MR. CLAREY: The middle count. I will move to dismiss that count.

12

13

14

MR. LONSCHHEIN: Then I take it you will rest immediately thereafter, assuming of course that my client and myself will stipulate?

15

MR. CLAREY: Yes.

16

17

THE COURT: You want the jury out of the room while you speak to your client?

18

MR. LONSCHHEIN: That is not necessary.

19

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21

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MR. CLAREY: The guy from Motor Vehicle will say -- there is an expired registration in July of 1973 for that 1966 green Oldsmobile and the same license number 7114KT. There is a registration prior to June of 1973 in the name of James Giacalone. The address is an address which I know to be his mother's address in

12

Richmond Hill.

MR. LONSCHER: We have one more
problem. This business of the registration is
not a problem. The only problem that I can en-
visage from your plan of not calling Stein is
that when you opened to the jury you said that
you would call him and you described in detail
what Stein did and where he got the money from.

(Continued on next page.)

4PM2next

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MR. CLAREY: I conferred with some of the assistants in the office. It was done in the case of United States versus Boyce -- Louis Boyce and Salamino. I do not have the citation. It was tried by Mr. Bashian, of our office, before Judge Rosling. I do not think it became an issue on appeal.

As I recall, we can check the record, what I said was that Stein would testify that the notes had the same origin as the other notes. I might have mentioned Giacalone and Vale, but I don't believe I went into too much detail about it. Even if I did, I think the defendant benefits.

MR. LONSCHERIN: I will not mention it to the jury. I will not make an issue of it in my summation while you do not do it.

I do make a formal objection to the Court that such a procedure is highly irregular and prejudicial to my client and deprives him of a fair trial under the Fifth and Fourteenth Amendments.

MR. CLAREY: I do not think your man is prejudiced by my not calling an extra witness

1 2

2 against him. I am making a judgment that I do
3 not need to prolong the trial --

4 MR. LONSCHEIN: I respect your judgement.

5 MR. CLAREY: I would be glad to mark
6 the 3500 material as to what he would testify
7 to and give you a copy.

8 MR. LONSCHEIN: I know what he will
9 testify to.

10 However, my point is this: If I were
11 to say aloud and repeat to the jury that which
12 you said Stein would testify to, I would be
13 reminding them that there is another potential
14 witness of the Government. I do not want to
15 do that.

16 At the same time, I have to protect my
17 client's rights. I am objecting to the proce-
18 dure. That is as far as it goes.

19 Now, let me find out the business of the
20 stipulation.

21 (Pause.)

22 MR. LONSCHEIN: Your Honor, counsel and I
23 are prepared to enter into a stipulation. The
24 substance of it is as follows:

25 I will stipulate that if the Government

3

calls a witness connected with the Motor Vehicle Department of the State of New York, that witness will testify that a certain Oldsmobile bearing the license plate KT7114, New York, was registered under the names of James Giacalone, the defendant, with an address at his mother's house in Richmond Hill.

MR. CLAREY: Fine, that is all I could prove and that registration was up until July of 1973.

MR. LONSCHHEIN: All right.

MR. CLAREY: From June of 1971 to July of 1973.

MR. LONSCHHEIN: That is stipulated to.

That may be read to the jury.

MR. CLAREY: The only thing I would add, it is a green Oldsmobile.

MR. LONSCHHEIN: I know it says that on the registration, so I will stipulate to that. I think there is a description of the automobile.

MR. CLAREY: He told me over the phone, green four-door sedan.

The count I would move to dismiss is Count Five of the indictment.

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2 it is for that reason I ask the Court to grant
3 this motion for acquittal under Rule 29.

4 THE COURT: Insofar as the informer and
5 accomplice is concerned, don't we have a credi-
6 bility question? Isn't that a credibility
7 question for the jury?

8 MR. LONSCHHEIN: Yes, your Honor.

9 Generally, credibility is for the jury,
10 but where the testimony of a witness is so
11 incredible because of the testimony he gives,
12 it is no longer a question of fact, it is a ques-
13 tion of law and that question of law could be
14 taken up by the Court and it is for that reason,
15 your Honor, I submit that the direct evidence
16 in this case is such -- if the Government relied
17 only upon that direct evidence -- there should
18 be a judgment of acquittal.

19 THE COURT: We note your argument and
20 we are going to deny your motion at this time.

21 MR. LONSCHHEIN: I respectfully except,
22 your Honor.

23 THE COURT: Yes, you may have an exception.

24 While I have counsel here, we do have the
25 problem -- we have noted your formal objection to

10

the procedure of the Government calling Mr. Stein --
we have the problem of the indictment and this
particular count.

MR. LONSCHHEIN: I am sorry, I did not
mean to interrupt.

THE COURT: You are not interrupting.
I was thinking out loud how it is going to be
resolved.

MR. LONSCHHEIN: I suggest since the
Government is abandoning its case against the
Stein transaction, that the Court dismiss it.

MR. CLAREY: I will move to dismiss
Count Five.

THE COURT: We, of course, are going to
grant it.

I was thinking of the procedure of how
we should remove it from the consideration of
the jury.

MR. LONSCHHEIN: Simply not charge it.

THE COURT: As though it is not there.

MR. CLAREY: I would handle it like any
other count dismissed after the Government's
case.

MR. LONSCHHEIN: I think if the jury is

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A-21

2 not made aware of the charge, it would cover it
3 to that extent.

4 However, the objection that I made before --

5 THE COURT: I realize that you have an
6 objection.

7 (Continued on next page.)

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THE COURT: I'm perfectly --

MR. CLAREY: If the Court would say something like -- during its charge -- "the indictment now contains three counts. Disregard any prior references to any other counter transactions." Then, "The counts I am going to charge you on --"

MR. LONSCHHEIN: Well, you know --

MR. CLAREY: I heard a similar charge Wednesday. Several counts are brought and counts are dismissed on defense motions. I've heard judges make similar charges. I can't recall the exact words. Something as if count five has been dismissed.

Well, I don't know, I don't remember the exact words.

"Count five is no longer part of the case."

THE COURT: It's up to me to handle it in the way that I see fit, but I am eliciting at this point your thoughts on hearing your thoughts, and then I'll --

MR. CLAREY: That's correct, I'd like to have a little more time to think about --

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2 and then I'll give you -- I know you are going
3 to think about it over the evening, but --

4 MR. LONSCHHEIN: May I, your Honor?

5 THE COURT: Sure.

6 MR. LONSCHHEIN: If the count was dismissed
7 with my actual consent, which it's not, by the
8 way, but if it were, I would simply suggest
9 to the Court that the Court completely ignore
10 it in the Court's charge, as if it never
11 existed; and I think that would be much better
12 procedure.

13 Otherwise, the jury would be reminded
14 that there was such a transaction.

15 THE COURT: Well, I'll look into the
16 procedure and see what I can determine. I'll
17 let counsel know how I propose to handle it
18 in the morning.

19 MR. LONSCHHEIN: All right, your Honor.

20 THE COURT: Now the question of argument.

21 Now, assuming an understanding you have
22 not decided, Mr. Lonschein, in the event you do
23 not put in any evidence, then counsel should
24 be prepared to go forward with their arguments,
25 and we would be hopeful that we could charge

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2 dates of September 1st to January 20th, and they
3 are going to have to find that there was a
4 conspiracy existing between those dates.

5 MR. CLAREY: As long as it is clear that
6 those dates are approximate.

7 THE COURT: I say approximate, they have
8 to find somewhere in there.

9 I am not going to charge No. 7.

10 MR. CLAREY: Your Honor, if I might
11 just comment on that January business?

12 As you know, I did not put in the January
13 evidence. If you could indicate it is not
14 necessary that the conspiracy fill that entire
15 period --

16 THE COURT: It's within those conclusive
17 dates. I think the evidence clearly establishes
18 at least to the Court's satisfaction that there
19 may have been some acts during that period
20 of time. Whether or not it amounts to a con-
21 spiracy will be for the jury. I will say,
22 as far as charge No. 5, which was the January
23 sale, I have considered that and I do intend
24 to advise the jury that this particular count
25 has been dismissed and they are to disregard

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2 any evidence pertaining to it and any state-
3 ments made by the Court or counsel -- counsel
4 for the Government in his opening statement.
5 I will call to their attention that this was
6 a count of a sale similar to Count No. 2, which
7 occurred in January. I know this is contrary
8 to what you would like, Mr. Lonschein. We have
9 to tell them that because we did read it to
10 them initially and there was comment.

11 MR. LONSCHEIN: May I note my formal
12 exception to the Court's proposed charge. I
13 again object to the fact that it was mentioned
14 by the United States Attorney in his opening
15 and then abandoned by the United States Attor-
16 nay to my client's prejudice, perhaps leaving
17 the jury with an inference that my client was
18 involved in more activity bearing on counter-
19 feit notes, and I submit that this is prejudicial
20 and deprives him of a fair trial, applicable
21 to the proper sections of the Fifth and Four-
22 teenth Amendments.

23 MR. CLAREY: I do not see how a count
24 dismissed by the Court will prejudice the
25 defendant.

2 MR. LONSCHHEIN: It's the bringing up of
3 the count in the first place.

4 THE COURT: I do not really think so.
5 It is not necessary in any opening statement
6 that every item be covered as far as proof
7 is concerned, whether it is established or
8 not established.

9 MR. CLAREY: The opening statement is
10 not evidence.

11 THE COURT: That is right.

12 MR. LONSCHHEIN: I want to make sure
13 that the record is protected with respect to
14 my position.

15 THE COURT: I am sure it is.

16 Request No. 8 I am not going to charge.

17 Request No. 9 I will charge pretty much
18 in substance, I would say.

19 MR. CLAREY: You will charge 9?

20 THE COURT: Well, in substance, in some
21 different language.

22 As far as the defendant's requests to
23 charge:

24 No. 1 of defendant request I do charge
25 as to the weight to be given to the testimony

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3 the jury comes in, and the Clerk asks them how
4 they find, I think he should ask them how they
5 find as to Count Ten, which on the copy of the
6 Indictment send to them was Count Three. I
7 don't know how else to do it, just so we are
8 clear.

9 All right, bring in the jury.

10 Do you wish to mark this?

11 THE CLERK: Yes, your Honor. I marked
12 the telephone calls as Count Exhibit 7.

13 (Document referred to was received and
14 marked Court's Exhibit 7.)

15 THE CLERK: And the jury note verdict
16 as the Court's Exhibit 8.

17 (Document referred to was received and
18 marked Court's Exhibit 8.)

19 (The jury thereupon returned to the court-
20 room at 5:40 o'clock P.M.)

21 THE COURT: All right, Mr. Clerk.

22 THE CLERK: Madam Foreman and Ladies and
23 Gentlemen of the Jury, have you agreed upon a
24 verdict?

25 THE FORELADY: Yes, sir.

THE CLERK: In the case of the United

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2 States of America against James Giacolone, how
3 do you find the defendant James Giacolone on
4 Count One; Guilty or Not Guilty?

5 THE FORELADY: Not Guilty.

6 THE CLERK: How do you find the defend-
7 ant James Giacolone on Count Two; Guilty or
8 Not Guilty?

9 THE FORELADY: Not Guilty.

10 THE CLERK: How do you find the defend-
11 ant James Giacolone, which is Count Ten, and
12 you have there Count Three; how do you find the
13 defendant, Guilty or Not Guilty?

14 THE FORELADY: Guilty.

15 THE CLERK: Guilty.

16 Madam Forelady, and Ladies and Gentlemen
17 of the Jury, as the Court has received your
18 verdict, you say you find the defendant James
19 Giacolone, Not Guilty on Count One, Not Guilty
20 on Count Two, and Guilty on Count Ten, which you
21 have as Count Three, which is considered as
22 Count Ten, and so say you all?

23 MR. LONSCHZIN: If the Court please. I
24 move that the jury be polled.

25 THE COURT: All right, Mr. Clerk, will

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2 any reason why a copy of the pre-sentence report
3 should not be given to Mr. Giacalone.

4 MR. CLAREY: I see no reason.

5 THE CLERK: There are two defendants.

6 THE COURT: Yes, but only Mr. Giacalone
7 was tried.

8 THE CLERK: That's right, your Honor.
9 The other one took a plea.

10 (Recess taken)

11 THE CLERK: For sentence, James Leonard
12 Giacalone.

13 THE COURT: Mr. Silbowitz, have you had
14 the chance to go over the pre-sentence report
15 with your client?

16 MR. SILBOWITZ: Yes, I have, your Honor.

17 THE COURT: Have you also had an opportunity
18 to discuss the matter with Mr. Lonshein?

19 MR. SILBOWITZ: Yes, I have.

20 THE COURT: Do you know of any reason
21 why we should not proceed to impose sentence?

22 MR. SILBOWITZ: With the Court's permission --

23 THE COURT: I suppose you have a motion.

24 MR. SILBOWITZ: I would like to make a
25 brief oral motion.

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2 As your Honor recognizes I was not the
3 attorney who tried this law suit and I was
4 associated with Mr. Lonshein who has now been
5 given the honor of joining the judiciary and
6 is now a member of the Queens County bench and
7 on his behalf, or rather, now, on behalf of the
8 defendant, I would now like to make an application
9 to vacate and set aside the conviction of this
10 defendant under the count on which he was found
11 guilty.

12 The gravamen or basis of this application --
13 and I said it would be brief and I will keep it
14 brief -- is that at the time of the opening the
15 United States Attorney specifically alleged that
16 he would offer proof in connection with the acts
17 that this defendant committed and one Philip Stein,
18 which formed one of the counts of the indictment
19 under which this defendant was charged.

20 As part of the opening, as was his right,
21 he read the specific count of the indictment relat-
22 ing to Mr. Stein. If he had stopped there I might
23 have not have been making this motion but he went
24 one step further: He made a statement to the jury
25 that he was going to offer certain elements of

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2 proof with respect to Mr. Stein but more particular-
3 ly with respect to the source of the counterfeit
4 as it related to this particular defendant.

5 It is my understanding that Mr. Stein was
6 in court on at least one of the days of the trial.
7 I was not here but this is what I have been told
8 and I have also been told that Mr. Stein at all
9 times was under the control of the United States
10 Attorney, at least to the extent -- I don't mean
11 that his testimony could be controlled -- but what
12 I mean is at least, to the extent of being called;
13 that is, he was subject to being called.

14 Now, it seems to me that a serious prejudice
15 was worked against this defendant as follows: The
16 prosecutor was able to get two bites out of the
17 apple in the sense that he read to the jury the
18 indictment and we recognize that that is an
19 accusatory statement and the jury was so instructed
20 by the Court -- that it is an accusatory statement,
21 but in going the one step further he accomplishes
22 the telling to the jury of a crime which he could
23 have offered evidence, since the party supposedly,
24 who was to give the evidence was in court but
25 then he chose not to.

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2 Now, whether or not the thoughts that
3 these allegations coming from the prosecutor to
4 the jury had any affect is something of course
5 that is problematic because no one can go into
6 the minds of the jury. But having raised the
7 implications of a crime which obviously he knew
8 he was not going to present -- because in read-
9 ing the opening statement, in detail in what
10 he was going to do as to each count, he detailed
11 the testimony that he was going to illicit.

12 When he gets down to detailing what it
13 was that he was going to do with Mr. Stein --
14 and it is found on page 9 of the opening statement
15 in a very brief paragraph, he simply said he was
16 going to prove but he didn't commit himself to
17 the extent that he was going to put Mr. Stein on
18 the witness stand whether he was going to illicit
19 certain facts from Mr. Stein.

20 From this, I infer -- I could be wrong --
21 but from this I infer that there must have been
22 a certain amount of hesitation in the mind of
23 the prosecutor as to what he was going to do with
24 this count at the time he was making that opening
25 statement.

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2 Now, I think he was under a duty to this
3 defendant that if he had these doubts in his mind
4 to resolve them before having made that opening
5 statement and before having actually made the
6 charge, as the United States Attorney.

7 To us in the profession, of course, we are
8 all lawyers but to lay jurors, the United States
9 Attorney takes on some additional stature as the
10 so-called knight on the white horse and I submit
11 to your Honor that having made the factual state-
12 ments that he did to the jury in the opening, that
13 he may have created a sufficient amount of prejudice
14 that would warrant vacating and setting aside the
15 jury verdict of guilty on count 10 and for this
16 reason we ask for a new trial.

17 THE COURT: Was it count 10 you say the
18 United States Attorney was referring to?

19 MR. SILBOWITZ: No, sir; count five.

20 THE COURT: The defendant was found not
21 guilty on that count.

22 MR. SILBOWITZ: If I may, your Honor --

23 THE COURT: Yes --

24 MR. SILBOWITZ: (continuing) During the
25 course of the trial -- the termination of the trial,

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2 as I understand it, the United States Attorney moved
3 for a dismissal. This was over the objections of
4 the defendant on the grounds that having made these
5 factual allegations -- if he was found not guilty --
6 because the prosecutor made the motion but we say
7 the dye was cast once he made the factual allegations.

8 That, your Honor is the defendant's motion
9 before sentencing in the event your Honor denies
10 this motion.

11 THE COURT: What do you say, Mr. Clarey?

12 MR. CLAREY: I say that very often it occurs
13 that during the course of a trial one or more counts
14 that were discussed in the opening statement and
15 included in the indictment are dismissed.

16 The fact that these are dismissed I would
17 submit benefits the defendant no end and does not
18 prejudice him in any way when counts are dismissed
19 against him.

20 I would submit that a decision was made not
21 to present that evidence after the opening statement
22 was made, just before the conclusion of the Govern-
23 ment's case.

24 I submit that we are entitled to make that
25 determination and the defendant cannot claim

STATE OF NEW YORK)

SS:

COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 27 day of MARCH, 1974, deponent served the within APPENDIX upon U.S. Atty.
EASTERN DIST. OF N.Y.

attorney(s) for Appellee

in this action, at 225 CADMAN PLACE Apt 1
BRUCKLYN, N.Y.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this
27 day of MARCH, 1974

William Bailey

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976

